Supreme Court, U.S.
FILED

98 1348 OCT 26 1998

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of The United States
October Term 1998

MILAGROS ANGELES, et al.,
Petitioners,
v.

UNITED STATES OF AMERICA
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

Carmen M. Grullon
Attorney at Law
65 Bleecker Street
New York, New York 10012

212-228-2600
Counsel of Record for Petitioners

APPELLATE ADVANTAGE
POST OFFICE BOX 7506◆KANSAS CITY, MO 64116◆816-453-2424

62 pp

Appellants/Sureties Milagros Angeles, Rafael Polanco, Isabel Berrocal and Guillermo Esteves respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit in this case.

Questions Presented For Review

The Questions Presented For Review by this Court are as follows:

I. Did the Court of Appeals for the Second Circuit, commit reversible erred and abuse its discretion by affirming the decision of the U.S. District Court For The Southern District holding that: the Sureties/Appellants are not entitled to be relieved of their obligations under the Bond Contract despite the fact that its' holding and the holding of the U.S. District Court are *directly contrary to the well established holdings* of the U.S. Court of Appeals for the Second Circuit itself, the dominant holdings of other Circuit Courts across the country, and the landmark holding of the U.S. Supreme Court , in Reese v. U.S. 76 U.S.13 (1869) and other leading cases.

II. Did the Court of Appeals for the Second Circuit commit reversible error and abuse its discretion by making an *independent finding* of " *material misrepresentation* " based on the Restatements (Third) as a means to avoid "voiding" the Bond Contract in this case and relieving the Appellants of their obligations thereunder ; instead of making a legitimate

finding of *fraudulent concealment* based on the Appellants having satisfied *all five elements* of the well established test set forth in Rachman Bag v. Liberty Mutual Insurance Co., 46 F.3 230, 235-6 (CA 2nd ., 1994), for fraudulent concealment mandating the immediate remission of the Bond Contract in this case

III. Did the Court of Appeals for the Second Circuit, commit reversible error, abuse its discretion, exceed its jurisdiction deny the Appellants due process under the Fifth Amendment of the Constitution, and act in violation of FRCP 52 (a) and the U.S. Supreme Court holding in Inwood Laboratories, Inc., et., et . v. Ives Laboratories, 456 U.S. 844 & First Option of Chicago v. Manuel Kaplan, et. al., 514 U.S. 938 (1995), etc., by using a different standard of review than that used by the District Court. Hence, making an *independent* finding of "material misrepresentation" when the issue of material misrepresentation was *never* raised on appeal by either of the parties before the Court of Appeals itself, and it was *never* an issue at either the Trial Court level or the District Court level.

IV. Did the Court of Appeals for the Second Circuit, commit reversible error and abuse its discretion by misinterpreting and misapplying the test for fraudulent concealment under Rachman Bag v. Liberty Mutual Insurance Co., 46 F.3 230, 235-6 (CA 2nd ., 1994) .

V. Did the Court of Appeals commit reversible error and abuse its' discretion by affirming the decision of the District Court, *without first addressing the vital "threshold"*

issue of whether a *legally valid and enforceable Bond Contract ever existed between the parties* , which satisfied *all* of the basic *requisite* legal elements required under Contract law of *any* contract, in light of the existence of a pre-existing separate, secret plea Agreement between the Government and the Defendant, which materially increased the surety's risk as sureties for the Defendant (entered without the Appellants prior notice or consent) and; the Government's deliberate non disclosure of said Agreement.

VI. Did the Court of Appeals commit reversible error and abuse its' discretion by holding that: the Appellants were not entitled to be relieved of their obligations as Sureties under the Bond because the pre-existing, secret , written plea Agreement between the Government and the Defendant did not "*materially increase*" their risk as sureties for the Defendant and; therefore did not constitute a "*material modification*" of the Bond Contract the Appellants undertook on the Defendant's behalf .

VII. Did the Court of Appeals commit reversible error and abuse its discretion by holding that : under a "*continuing bond* " theory, the Sureties/Appellants are *not* entitled to be relieved of their obligations under the Bond because "a guilty plea" does not constitute a "material modification " of the bond, *even if* the Defendant agreed to plea guilty (*without the Appellants' prior knowledge or consent) prior to the Appellants undertaking the bond obligation on his behalf and even before the legal inception of the Bond Contract.*

IIX. Did the Court of Appeals commit reversible

error and abuse its discretion by affirming the decision of the District Court denying the Sureties/Appellants an evidentiary hearing, despite the raising of critical material issues by the Appellants which were either *never* addressed by the District Court (nor the Court of Appeals) or prematurely presumed in the Government's favor, but which could have resulted in relieving the Appellants of their bond obligations had the District Court found in the Appellants' favor on said issues, which included the following :

a. whether the Government had facilitated Defendant's fleeing to the Dominican Republic (where Defendant is a national and, where there exist no extradition back to the United States) by failing to confiscate the Defendant's passport after turning it over to the Defendant to enable him to renew his Viza and;

b. whether the Government's contentions that it had in fact informed the Appellants to "assume" the Defendant's guilt, and that it had interviewed the Appellants together as a group, were credible based on live (direct and cross) testimony, in light of the Appellants' denials to the contrary and the weight and credibility given to that contention by the Government in the rendering of a decision by the Court and ;

c. whether the Defendant's attorney did in fact translate to the three Sureties (who could neither speak or write English) the Government's alleged warnings to the Appellants regarding the Defendant's guilt and how they should not believe anything the Defendant's attorney or the

Defendant said to them about the Defendant's guilt or innocence and ;

IX. Did the Court of Appeals commit reversible error and abuse its discretion by affirming the decision of the District Court that the Government had not acted in an unconscionable manner or in a manner that "shocks the conscious"towards the Appellants through its deliberate concealment of its pre-existing Plea Agreement with the Defendant.

X. Is the Decision of the Court of Appeals contrary to public policy because it legally legitimatizes the continuance of well established and customary usage by the Government of inherently unfair tactics (such as Fraudulent Concealment, Omission And Silence) to entice innocent third parties (who are non professional sureties or non compensated volunteers, friends or family members) to become sureties for defendants who the Government wants to enlist as government informants in drug trafficking cases, and who secretly agree to plea guilty (without the knowledge or consent of the sureties) even *before* the sureties execute the bond in question.

List Of Parties To The Proceeding In the Court Below:

The parties in the Proceedings in the Court below are Appellants/Sureties - Milagros Angeles, Rafael Polanco, Isabel Berrocal and Guillermo Esteves and Appellee-Mary Jo White, United States Attorney (AUSA) for the Southern District of New York, Attorney for the United States Of America (hereinafter referred to as the "Government").

TABLE OF CONTENTS

Questions Presented for Review i
List of Parties vi
Table of Authorities viii
Opinions Below xii
Statement of Jurisdiction xii
Statement of the Case 1
Argument 4
Conclusion 30
Appendices
Appendix A
Decision of U. S. Court of Appeals
for the Second Circuit ..... Apdx A-1
Appendix B
Decision of U. S. District Court For the
Southern District of New York .. Apdx B-15

TABLE OF AUTHORITIES

Cases Cited **Page Number**

All State Insur. Co. v. American Bankers Insur. Co of Florida , 882 F.2d 861 (4th Cir. 1989) 20

Bank of New York v. Cheng Yu Corp, 413 N.Y.S.2d 471, (A.D. 2nd Dept, 1979) 13, 19

Becker v. Faver 280 NY 146, (1939) 19

Continental Casualty Co. v. U.S., 337 F.2d 602, 603 (1st Cir. 1964) 20

Dudley et al., v.U.S., 242 F.2d 656 (C.A. 5th Cir, 1957) 30

Damon v. Empire State Surety Co., 161 A.D. 875, 146 N.Y.S. 996 (2nDept., 1914) . . 12

Farmers' Nat. Bank of Franklinville v. Van Slyke, et.al., 1 N.Y.S. 508 (1888) 8

First Citizens Bank & Trust Co. of Utica v.Sherman's Estate,294 N.Y.S. 131 (AD , 4th Dept., 1937) 7, 11, 27

First National Bank & Trust Co of Racine v. Notte, 97 Wis.2nd 207 , (1980) 8, 27

First Option of Chicago v. Manuel Kaplan, et. al, 514 U.S. 938, 939 (S.Ct.1995) 4,6

Gansevoort Bank v. Empire State Surety Co. 195 NY 516 (1909) 19

General Crushed Stone Co. v. State, 19 NY2d 737 (1967) 10, 27

Harper Organization Inc. v. Brick & Metal
Wrecking Co.,226 N.Y.S. 826 (1928) 10
Inwood Laboratories , Inc., et. al., v.
Ives Laboratories Inc.,
456 U.S. 844, 858 (1982) 4, 5, 12
New Jersey v. Weissenburger,
189 N.J. Super. 172 (AD 1983) 13, 20
People v. Avarez, 94 Misc.2d 334 (1968) 13, 23
People v. Gonzalez, et al.,
745 P.2d 263 (C.A.Colo.1987) 20
People v. Loomis, 60 Colo. 202 (1915) 20
Pullman Standard v. Swint,
456 U.S. 273, (S.Ct. 1982) 12
Rachman Bag v Liberty Mutual Insurance Co.,
839 F. Supp. 998, 1002, (E.D.N.Y. 1993) .. 7, 18, 10
Rachman Bag v Liberty Mutual Insurance Co.,
46 F.3d 230 (CA 2nd Cir, 1994) ..... *passim*
Reese v. U.S., 76 U.S. 13 (1869) ..... *passim*
Smaldone v.United States,
211 F. 2d 161 (C.A. 10th, 1954) 30
State of New Jersey v. Vendrell, et. al.,
197 N.J Super.232, 236; (A..Div.1984). 15, 21
St. Paul Fire & Marine Insurance Co. v.
Commodity Credit Co.,
646 F. 2nd 1064, (CA 5th Cir.) 8
Tradesmen's Nat. Bank v. National Surety Co,
(1902) 19

United States Life Ins. Co. v. Cheng Yu Corp
413 N. Y. S. 2d 471(A.D. 2nd Dept. 1979). 19
U.S. V. D'Argento,
339 F.2d 925,928 (C.A.7th, 1964) 30
U.S. v Edgan
394 F.2d 262, 264, 267 (2nd Cir. 1968) .... *passim*
U.S. v. Frias-Ramirez,
670 F.2nd 849 (C.A. 9th Cir.1982) 13, 28
U.S. v. Galvez-Uriarte,
709 F.2d 1224 (CA. 9th Cir. 1983) ..... *passim*
U.S. v. Gambino, 17 F.3rd 572 (2nd Cir. 1994) .. *passim*
Mohasco Industries Inc. v. Griffen Industries, Inc.,
335 F. Supp 493 (1971, DC NY) 10
U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 12
U.S. v. Martinez,
613 F.2d 473, 474 (3rd Cir. 1980). 13, 21, 24
U.S. v Miller, 539 F.2d 445 (5th Cir. 1976) 13
U.S. v. Robinson,
453 F.Supp. 1,3 (S.D.N.Y.1977) 5, 12, 29
United States Life Ins. Co. v. Salmon,
36 N.Y.S 830 (1st Dept. 1895) 10
U.S. v. Parr, 594 F.2d 440 (C.A.5th, 1979) 13,30
Wagoner v. Brady, 221 AD 405 (1927). 20
Zenith Radio Corp. v. Hazeline Research, Inc.,
395 U.S. 100, (S.Ct.1969) 12

OTHER AUTHORITES

Fed. Rules of Crim. Proc.
Rule 46(e)(2, 3, 4) and (f) xii
Fed. Rules of Civ. Proc. Rule 52(a) xii
18 U.S.C. § 3142 xii
18 U.S.C. § 3144 xii
21 U.S.C. § 812 xii
21 U.S.C. § 841 xii
21 U.S.C. § 846 xii
NY ST CPR E.C. 7-13 28
U. S. Const., Fifth Amend. ..... xii, 4

Opinions Below

On August 10, 1994, while before the U.S. District Court For the Southern District, Sureties/Appellants made a Motion to Vacate A Default Judgment rendered against them & To Set Aside An Order Forfeiting the Appearance Bond and Cash Bail for $260,000.00 they had undertaken on behalf of Defendant Alejandro Martinez when Defendant fled the Jurisdiction. The District Court Decision rendered a decision dated July 3, 1997, denying Appellants' Motion. The Decision is reported at United States of America v. Alejandro Martinez, et. al, Criminal Docket No. 92-718.

The Appellants appealed the aforementioned District Court Decision to The United State Court of Appeals for the Second Circuit, and that Court issued a decision affirming the earlier District Court decision in favor of the Government's right to forfeiture of the bond and bail in question. The Decision of the Court of Appeals dated July 28, 1998, is reported under United States of America v. Alejandro Martinez, et. al., Criminal Docket No. 97-1449, Subproceeding No. 1435.

Statement of Jurisdiction

This Court has jurisdiction in the instant case under Fed. Rules Crim. Proc. Rule 46(e)(2,3,4) and (f), 18 U.S.C.A. Sec. 3142 and 3144; Title 21, United States Code, Sections 812, 841 (a), 841 (b)(1)(A) and 846.

Statement of the Case

1. **On August 14, 1992:** Defendant a twenty year employee of NYNEX, devoted father and husband is arrested on drug related charges . He pleas "not guilty" in open court in front of his family. Thereafter, he immediately begins to secretly cooperate with Government.

2. **On September 2, 1992 :** that *morning*-Defendant signs a formal Separate Secret Cooperation Agreement with the Government and therein agrees to become a government informant and witness against his co defendants. The Agreement is drafted by his lawyer in the form of a letter and addressed to AUSA M.. Rogoff..

3. **On September 2, 1992:** *Later That Afternoon*-Sureties execute a Bail Bond For Defendant in the amount of $260.000.00 , based on their undisputed good faith belief that the defendant was innocent of the charges against him and intended to go to trial to proof his innocence, in accordance with his earlier plea in open court of "not guilty". The Sureties/Appellants had. absolutely no prior knowledge that the Defendant had earlier that morning, executed a formal Agreement with AUSA Rogoff on behalf of the Government, to plea guilty.

4. **September 16, 1992-**Without Notice or consent of the Sureties/Appellants, Defendant plead guilty in accordance with the September 2, 1992 Separate Secret Cooperation Agreement with the Government . The Defendant plead guilty to one count of conspiracy to distribute cocaine. Defendant's formal sentencing is deliberately *delayed* for *19 months* until

January 26, 1994, by the Government to facilitate Defendant's continued cooperation with the Government as a Government Witness and Informant. As part of his "cover", with the Government's consent and approval, Defendant resumes his seemly "normal" family life and returns as an employee to his job of 20 years with NYNEX.

5. **October 26, 1993:** The Defendant pled guilty to a new charge of making false statement to a government agent during his debriefing session. The Sureties were not informed by the Government of this new charge against the Defendant, nor of his two pleas of guilt.

6. **Sometime in 1993:** Government facilitates the renewal of Defendant's Visa and Defendant's retrieval of his *Passport*, without the knowledge or consent of the Sureties. The Government fails to retrieve back from the Defendant his passport. Thereby subsequently enabling the Defendant to flee the United States in November of 1993 to the Dominican Republic (where the defendant is a national) where there is no extradition treaty with the United States.

7. **November 1, 1993:** Defendant flees the Jurisdiction one day prior to his being scheduled to testify at the trial of co defendants, 14 months after being out on bail and 5 months prior to his scheduled sentencing where he faced a maximum sentence of life, minimum of 10 years imprisonment and more than 4 Million Dollars in fines.

The Defendant is presumed by the Government to of been kidnaped or murdered by drug traffickers against whom he's been serving as an informant. The Government takes

immediate steps to protect the Defendant's wife and 3 minor children fearing for their lives or that they'll be kidnaped by drug traffickers as revenge for Defendant's undercover activity on behalf of the Government.

Upon learning about Defendants' escape, Surety Milagros Angeles begins cooperating with the Government to recapture Defendant but to no avail. While Surety Rafael Polanco at his own expense travels to the Dominican Republic to find the Defendant but is also unsuccessful in his attempts.

8. **November 2, 1993:** The Defendant telephones his Attorney and informs him of death threats made to him and to his family by drug traffickers, as result of being discovered to be acting as a secret government witness and informant.

Months earlier in January 1993, Defendant's co defendant "Chico" was murdered by drug traffickers, so the Defendant took the threats to his life and that of his family seriously.

9. **July 15, 1994-August 12, 1994:** Government Files Motion To Foreclose on Appearance Bond and Cash Bail based on Defendant's "bail jumping". The District Court for the Southern District of New York, issues a Forfeiture Order granting judgment against the Sureties/Appellants.

10. **January 5, 1996-October 26,1998:** Sureties-Appellants make "Motion To Vacate Default Judgment & To Set Aside Order Forfeiting Appearance Bond & Cash Bail ", the District Court denies their motion . The Sureties then

Appeal to the U.S. Second Circuit Court of Appeals , which affirms the decision of the District Court by Decision dated July 28, 1998. Subsequently, in October of 1998, the Appellants/Sureties apply for a Writ of Certiorari to the U.S. Supreme Court of the United States, seeking to overturn the two decisions rendered in favor of the Government by the District Court and Court of Appeals respectively.

Arguments:

Argument No. 1:

Firstly, the Appellants respectfully contend that their Petition for certiorari before this Court should be granted because the Court of Appeals committed reversible error, abused its discretion , exceeded its jurisdiction, denied the Appellants due process under the Fifth Amendment of the Constitution, and acted in violation of FRCP 52 (a) and the U.S. Supreme Court holdings in Inwood Laboratories, Inc., et., et . v. Ives Laboratories, 456 U.S. 844 & First Option of Chicago v. Manuel Kaplan, et. al., 514 U.S. 938 (1995), etc., by using a *different standard of review* than that used by the District Court. Hence, making an *independent* finding of "material misrepresentation" when the issue of material misrepresentation was *never* raised on appeal by either of the parties before the Court of Appeals itself, and it was *never* an issue at the District Court level.

The Court of Appeals made an independent finding of " material misrepresentation " based on the Restatements (Third) as a means to avoid "voiding" the Bond Contract in this case and relieving the Appellants of their obligations

thereunder ; instead of making a legitimate finding of fraudulent concealment based on the Appellants having satisfied *all five elements* of the well established test set forth in Rachman Bag v. Liberty Mutual Insurance Co., 46 F.3 230, 235-6 (CA 2nd ., 1994), for fraudulent concealment mandating the immediate remission of the Bond Contract in this case. Moreover, when it affirmed the District Court's Decision, the Court of Appeals ignored the Government's "duty" of "advance" "formal notice" to the Appellants [as mandated by U.S. v. Robinson, 452 F. Supp.1 (S.D.N.Y. 1977) and U.S. v. Edgan, F.2d 262 (2nd Cir. 1968)] regarding the Defendant's pre-existing Plea Agreement to plea guilty . It also ignored the Government's "duty" of "good faith" "fair dealing", "honesty" and "clean hands", in its dealings with the Appellants as Sureties. As a result of having applied a *different standard of review* than that used by the District Court, *misconstruing and misapplying the applicable law*, the Court of Appeals erroneously concluded that under FRCP 46 (e) (1-4) & (f) , "justice" did not mandate remitting the Bond and thereby relieving the Appellants of their bond obligations in this case.

In Inwood Laboratories, Inc., et. al., v. Ives Laboratories Inc., 456 U.S. 844, 858 (1982), *this Court* essentially held that a Court of Appeals should apply "ordinary standards" when reviewing District Court decisions and they "*should not* " "decide questions of law de novo" . Nor should it apply *different standards of review than those used by the District Court.* " It is undesirable to make the law

more complicated by proliferating special review standards without good reason. More importantly, a Court of Appeals' reviewing attitude toward a District Court decision should depend upon the respective institutional advantage of trial and appellate courts, not upon what standard of review will more likely produce a particular substantive result". [1]

Here, the Second Circuit Court of Appeals clearly violated the aforementioned standard of review established by this Court, by which it was obligated as a matter of law to review the decision of the District Court by deliberately and arbitrarily applying a *different standard* of review than that used by the District Court. Instead of adhering to the Rachman Bag test, it made an *independent legal finding of "material misrepresentation ", which conversely does not mandate the voiding of a surety contract .*

In the Second Circuit, *fraudulent concealment* has been "recognized as an affirmative defense" to prevent the enforcement of a surety contract and relieve a surety of any liability thereunder. As recognized by the Court in Rachman Bag the Appellants in the instant case have the "*strongest*" possible case for raising the affirmative defense of fraudulent concealment by the Government and for asserting the Government's "*duty to disclose*" to the Appellants, the pre-existing Plea Agreement between itself and the Defendant. The reason for this being that the Government (via AUSA Rogoff) dealt with the Appellants "directly" when they

---

[1]see also, First Option of Chicago v. Manuel Kaplan, et al., 514 U.S. 938, 939, (1995).

undertook the Bond Contract in question and; it was "responsible for inducing the sureties" to enter into the surety contract in question.. Based on the Government's fraudulent concealment, as a mater of law, the Bond contract was "voidable at its inception" and it is not enforceable as against the Appellants.[2] [3]

The Five requisite elements for fraudulent concealment under the Rachman Bag test are:(i) obligee must know facts that materially increase [the] surety's risk and; (ii) obligee must have reason to believe that the surety would be unwilling to [or never intended to] assume such higher risk; (iii) obligee must have reason to believe that such facts are unknown to [the surety]; (iv) obligee must have opportunity to communicate relevant information to surety and; (v)obligee must have duty to disclose information based upon its relationship to surety, its responsibility for surety's mis-

---

[2]Rachman Bag v Liberty Mutual Insurance Co.,46 F.3d 230,235-7 (CA 2nd Cir, 1994);. Rachman Bag v Liberty Mutual Insurance Co.,839 F. Supp. 998 (E.D.N.Y. 1993);First Citizens Bank & Trust Co. of Utica v. Sherman's Estate, 294 N.Y.S. 131 (AD, 4th Dept., 1937)

[3]It should be stressed that instead of relying on the traditional language and application of Rachman Test and Decision itself adhered to in the 2nd Circuit, the Court of Appeals here instead, erroneously relied more heavily on the Restatement Third's interpretation of fraudulent concealment. This resulted in the misapplication and misconstruing of the Rachman test and in a negative decision for the Appellants.

impression, or other circumstances"[4]

Here, the Appellants easily pass the 5 element "test" under Rachman Bag for fraudulent concealment because the relevant facts pertaining to the test are essentially *undisputed*. (1) The Government entered into the Agreement with Defendant to get him to plea guilty. Therefore, it "knew about the facts that would materially increase" the Appellants' "risk" as sureties under the Bond. (2) The Government had reason to believe that the Appellants *never intended* to assume the greater risks created by Defendant's Agreement to plead guilty . It knew that the Defendant's admitted guilt was not factored into the Appellants' estimation of the "calculated risk", they intended to assume at the time they undertook the Bond. The Government deliberately did not disclose Defendant's admitted guilt to the Appellants, an irrefutably "material" and "critical"piece of information necessary for the Appellants to make an "informed" and "intelligent" decision about whether to become sureties for the Defendant. The Government also had reason to believe that it was *highly unlikely* that not only the Appellants (but that any "*reasonable person*") would assume the "*higher risk*" of undertaking an Appearance Bond for an *admittedly guilty*

---

[4]See also, Rachman Bag v Liberty Mutual Insurance Co.,839 F. Supp. 998, (E.D.N.Y. 1993; see also, First National Bank & Trust Co of Racine v. Notte, 97 Wis.2nd 207 , (1980); St. Paul Fire & Marine Insurance Co. v. Commodity Credit Co. 646 F. 2nd 1064, (CA 5th Circuit), Farmers' Nat. Bank of Franklinville v. Van Slyke, et. al., 1 N.Y.S. 508 (1888).

Defendant *(who had a greater likelihood of fleeing) after obtaining actual "notice" of his guilt* . However, the *only way* the Government could insure Appellants' assent to becoming sureties for the Defendant (so as to enable the Defendant to be released from jail on bail to become a government informant and witness) was by not disclosing the Defendant's guilty plead. Hence, by virtue of the non disclosure of this vital information, the Government "induced" and "manipulated" the Appellants into executing the Bond for the Defendant. (3) The Government and the Defendant had "unique" and "exclusive" " access " to the fact that Defendant had agreed to plead guilty prior to the Appellants executing the Bond because the pre-existing Plea Agreement was "*secret*" and kept under "*seal*". As a result, the Government "had reason to know" and did in fact "know" that the Appellants were being *deceived* and were under a "mis-impression" about the Defendant's innocence and the extent of the risk they were assuming at the time. Rachman, Ibid at 235-7 (4) The Government had the *perfect opportunity* to "communicate" with and "notify" the Appellants that the Defendant had plead guilty, when AUSA Rogoff met with the Appellants to "confirm" their financial eligibility and to "explain" to them their obligations as Sureties under the Bond. (5) There is no question that the Government here had the highest possible *"affirmative " legal and ethical "duty"* to disclose and *formally notify in advance*, the Appellants of Defendant's pre-existing guilty plead Agreement. In Rachman the Court essentially held: The obligee has an

"affirmative duty" to fully disclose or "make an explanation" of "all relevant information bearing on the risk" which the surety is to assume under the surety contract, when he "volunteers" and ; the obligee has "exclusive" or "unique access" to the undisclosed information, to provide the surety with an explanation or information regarding the surety contract. This includes the duty "to speak out to correct any false impressions which the surety has and which the creditor knows he has". Consequently, a "bond obligee has a duty to disclose information to a surety if silence would amount to an affirmative misrepresentation";[5] even in situations where the deception originated with the defendant, the Government can not "part take in the deception". [6] For in point of fact, "it remains the obligee's duty to act at all times in good faith, and honestly towards the surety, and not to mislead the surety by misrepresentations or omissions".[7] Moreover, "a surety is [a] favored debtor, whose rights are zealously guarded, both

---

[5] Rachman Bag v Liberty Mutual Insurance Co.,46 F.3d 230, (CA 2nd Cir, 1994)177; Mohasco Industries Inc. v. Griffen Industries, Inc., 335 F. Supp 493 (1971, DC NY); General Crushed Stone Co. v. State, 19 NY2d 737 (1967).

[6] U.S. Life Ins. Co., v. Salmon, et. al., 36 N.Y.S. 830 (1st Dept, 1985); Harper Organization Inc., v. Brick & Metal Wrecking Co., 226 N.Y.S. 826 (1928); Vaugh v. U.S. Title Guaranty & Indemnity Co., 122 N.Y.S. 393 (AD 1st Dept., 1910).

[7] Rachman Bag v Liberty Mutual Insurance Co.,839 F. Supp. 998 (E.D.N.Y. 1993).

at law and in equity, and the creditor's slightest fraud touching the contract annuls it". Consequently, a surety is "entitled to full disclosure at every point likely to bear on his disposition to enter into a [surety] contract". This is especially the case where the surety is acting in a "*purely voluntary*" capacity and is *not as a professional or compensated* surety.[8]

As just demonstrated herein, the Appellants met all five elements of the Rachman Bag test. In fact the *Court of Appeals itself acknowledged in its Decision that the Appellants had met at least three of the requisite elements of fraudulent concealment under Rachman*[9]. In its Decision, the Court of Appeals stated: "the second and third elements of ... the fraudulent concealment test are obviously present in this case. The government knew that the sureties were ignorant of Martinez's plea agreement, and the government had an opportunity to inform them of the agreement when it gave them the other information about the bond." ". . . . The "materiality of the undisclosed information, is also satisfied. Each surety filed an affidavit stating that he or she would not have signed the bond had they known that Martinez had already agreed to plead guilty." The District Court Judge " appeared to accept the sureties claims when he stated that "the

---

[8] First Citizens Bank & Trust Co. of Utica v. Sherman's Estate, 294 N.Y.S. 131 (AD, 4th Dept., 1937); U.S. v. Aguilar, 813 F. Supp.727, 728.

[9] The Court of Appeals did not address the issue of "duty by the Government" (Appdx A-9) as a requisite element of the Rachman test.

was not guilty and that he should be released on bail". Apdx A-11 see also, U. S. v. Aguilar, 813 F. Supp.727, 728..

Consequently, it was reversible error for the 2nd Cir. Court of Appeals to make an independent finding of material misrepresentation in this case. In fact, a finding of material misrepresentation is proper and most likely to be necessary, *only* when the Surety has *failed* to meet *all five* elements of the Rachman test and consequently failed to prove fraudulent concealment. Such is not the case here.

Argument # 2:

Secondly, the Appellants respectfully contend that their Petition for Certiorari before this Court, should be granted because the Decision of the Court the Court of Appeals is in *direct conflict* with this Court's well established holding in the *landmark* case of Reese v. U.S., 76 U.S. 13 (1869);[10] as well as the dominant holdings of the U.S. Court of Appeals for the 2nd Circuit itself in such cases as, U.S. v. Gambino, 17 F.3rd 572 (2nd Cir. 1994)[11] and ; the cases of

---

[10] Also, Inwood Laboratories, Inc., et. al., v. Ives Laboratories Inc., 456 U.S. 844, 850-1 (1982) and ; Pullman Standard v. Swint, 456 U.S. 273, (1982) ; Zenith Radio Corp. v. Hazeline Research, Inc., 395 U.S. 100, (1969) ; U.S. v. U.S. Gypsum Co., 333 U.S. 364.

[11] Also, U.S. v Edgan 394 F.2d 262, 264, 267 (2nd Cir. 1968); U.S. v. Robinson, 453 F.Supp. 1,3 (S.D.N.Y.1977); 27.Rachman Bag v Liberty Mutual Insurance Co.,46 F.3d 230,235-6,(CA 2nd Cir, 1994); Damon v. Empire State Surety Co.,161 A.D. 875, 146 N.Y.S. 996 (2nd Dept., 1914); Bank of New York v. Cheng Yu Corp, 413 N.Y.S.2d 471,(A.D. 2nd

other Circuits across the country, such as New Jersey v. Weissenburger, 189 N.J. Super. 172 (AD 1983).[12] Moreover, the Court again violated the mandates of FRCP 52 (a), setting forth the proper standard of review for appellate courts. It again also *misconstrued and misapplied the law* with respect to what constitutes a "material modification of contract" and what constitutes a material "increased risk" in such situations.

Contrary to prevailing case law, the Court of Appeals for the 2nd Cir., held that : there was *no material modification* of the Bond Contract undertaken by the Sureties in this case based on the Government's deliberate non disclosure of the *pre-existing,* written Plea Agreement entered into by the Government and the Defendant *(without the Appellants' prior knowledge or consent)* because the Defendant's guilty plea "did *not* materially increase" the Appellants " risk as sureties". . *Apdx A*-8 Consequently, the Appellants were not entitled to be relieved of their bond obligation based on the affirmative defense of modification of the Bond Contract.

In support of this holding the Court's rational was

Dept, 1979); People v. Avarez, 94 Misc.2d 334 (1968); U.S. v. Accardi, 241F.Supp. 119 (D.C.N.Y. 1964)

[12] Also, U.S. v. Galvez-Uriarte, 709 F.2d 1224 (CA. 9th Cir. 1983); U.S. v. Frias-Ramirez, 670 F.2nd 849 (C.A. 9th Cir.1982); U.S. v. Martinez, 613 F.2d 473, 474 (3rd Cir. 1980); U.S. v Miller, 539 F.2d 445 (5th Cir. 1976); U.S. v. Castaldo, 667 F.2d 20 (C.A. 9th, 1981);U.S. v. Parr, 594 F.2d 440 (C.A.5th, 1979).

twofold. The Court's *first rational* was that " Martinez's plea agreement .... was signed before the bail bond was issued , and was *never modified thereafter"*. Thus the *pre-existing, written* Plea Agreement in question, did not modify the terms of the actual bond executed by the Sureties after the execution of said Plea Agreement by the Defendant and the Government. Therefore, the Court concluded that the affirmative defense of modification was not applicable in this case and that the Appellants should not be relieved of their obligations as sureties for the Defendant on said grounds. Apdx A-8.

The Court's *second rational* was that "the sureties signed a continuing bond that guaranteed the defendant's appearance even after his conviction." "A defendant's guilty plea does not constitute a material modification of the terms of a continuing bond because by signing such a bond a surety assumes whatever increased risk of flight results from the defendant's conviction, whether at trial or after a guilty plea". Here, the Court reasoned that : "since Martinez's guilty plea did not materially increase the risk to the sureties, the government's failure to disclose it did not relieve the sureties of their obligations under the bond.. Apdx A-8-9.

In support of its 'rational the Court cited well settled authorities such as United States v. Gambino, 17 F. 3d 572, 574 (2nd Cir. 1994); U.S. v. Catino, 562 F. 2d 1, 3, (2d Cir. 1977), etc.. Despite the applicability of these cases with respect to the *standard of review* unitized in all bond forfeiture cases, all of these cases are nevertheless

distinguishable from the case at bar from a crucial factual perspective. *This case is completely unique as compared to any of the cases cited by the Court of Appeals in its decision and* distinguishable from any "*continuing bond obligation* "because the Defendant had *already* agreed to plea guilty *prior* to the Sureties undertaking the Bond obligation on his behalf versus the Defendant agreeing to plea quilty *after* the Sureties executed the Bond in question . The fact that the Defendant *pled guilty formally* before the Court *after* the Bond had been executed by the Sureties was merely a technical formality conveniently engineered by the Government so as to shield themselves from any future allegations of fraudulent conduct or improper concealment as is the case now. Additionally, the taking by the Defendant of an immediate plea of guilty in open court , might have jeopardized the Defendant's position as a government informant by raising suspicion against him. The fact that the Defendant formally plead guilty *after* the Appellants had executed a bond on his behalf does not necessarily make the Appellants liable under a *continuing bond* obligation theory. For instance, in State of New Jersey v. Vendrell, 484 A,2d 720 (AD 1984) contrary to the holding of the Court of Appeals in the instant case, the court held that: "unless a bail bond surety has initially agreed, either expressly, by implication, or by operation of law, to extend its obligation beyond time of entry of judgment of conviction, he cannot be held responsible thereafter because of a material increase of the risk obviously attendant upon the conviction". Hence, if

the surety neither consents or is notified of the defendant's conviction, his bond obligations do not automatically continue. Ibid 720. *Consequently, there is no precedent to support the position taken by the Lower Court in this case.*

The Court of Appeals' ruling is also contrary to the *landmark holding of this Court in* Reese v. U.S., 76 U.S. 13 (1869). Applying what the Court referred to as "ordinary and settled doctrine which controls the liability of sureties", the Reese Court held: sureties to a bail bond are discharged of all liability when a *separate stipulation* is made "without their knowledge or consent, between the Principal and the Government",which has "changed the character" of the surety's obligation. In such instances, the surety is for "obvious reasons" released from the original obligation he contracted for because it has "ceased to exist" and a "new" obligation is "substituted" in its place, for which he is not liable. Ibid 13, 21.

A surety is not bound by the original contract in "its altered form", because he never agreed to the altered contract, nor was it their original intent to be bound by anything other then his original agreement. This is especially the case, when the "risks" the surety undertook in the original contract are greatly increased by the altered agreement. Consequently, no matter how "trivial the change" even when its' to the advantage of the surety, the surety is *not* bound and may stand on the original terms & conditions of his original bond contract. Ibid.

Clearly, none of the rulings pertaining to the

affirmative defense of modification of bond contracts and the issue of "increased risk" to sureties , make any distinction as to *when the modification in question took place*. That is whether the modification took place *before or after* the surety undertook the bond obligation on behalf of the defendant. The fact that a separate agreement was entered into by the Government and the Defendant just *before* the Sureties executed the Bond Contract on the Defendant's behalf, still constitutes a legal modification of the contract as defined by prevailing case law, as long as the Surety's obligation under the Bond was affected by that separate, secret, Plea Agreement and; it resulted in a "material increase" in the "risk" that the Surety's *originally intended* to assumed at the inception of the Bond Contract, at the time he executed said Bond Contract. This fact in itself nullifies the *otherwise* legitimate contractual obligations of the Sureties at the very inception of the Bond Contract because the Government and the Defendant deliberately concealed the existence of the Secret Agreement entered between them wherein the Defendant agreed to plea guilty, even though it had a direct affect on the Sureties obligations and the risk they thought they were assuming and those they did actually end up assuming, upon undertaking a bond on the defendant's behalf in the instant case. Through the act of deliberate omission the Sureties were mislead into believing that the Defendant still stood by this earlier plea of innocence, even though he had denounced that plea by admitting his guilt to the Government. The Government, the Defendant, the

Defendant 's attorney and the FBI agents who were present during the Bond interview process of the individual Suerties, all conspired into deceiving the Sureties into thinking that the misconception under which they were basing their willingness to become Sureties on the Defendant's behalf still existed as a reality, when in fact it did not. Irrefutably, in light of this the Sureties should be relieved of their obligations under the Bond Contract in this case.

Moreover, the Court of Appeals *misconstrued and misapplied* the law in this case because it erroneously sought a much *too literal* definition of the legal term "modification of contact " thereby missing the very "essence "of the holding of Resse and other like cases such as U.S. v. Galvez-Uriarte, 709 F.2d 1325, U.S. v. Weissenburger, 459 A.2d 693, U.S. v. Aguilar, 813 F. Supp. 727,728 (1993). The latter prevailing case law supports a much more liberal and less literal view, then that adopted by the Court in this case.. Under prevailing case law, in order for the "modification" of a bond contract to of taken place, it does *not* require that the bond contract itself be physically changed or modified.

The modification of a contract which discharges a surety need not be accomplished in writing, but may take the form of an agreement, course of conduct, or dealing between the principal parties, or even silence or inaction with respect to an obligation or debt which essentially varies the terms of the contract, without the knowledge or consent of the surety; thereby changing the terms contemplated in the original

agreement.[13]

In fact, in all of leading cases which support the Appellants' position (contrary to the position of the Court of Appeals in this case) the writings involved (constituting the modification to the bond in question) have been physically "separate agreements" which "affected" the risk undertaken by the sureties and the terms of the original bond they executed., Reese, Weissenburger, Aguilar, Ibid. etc.[14]

All that is required is that whatever "separate agreement" or "deal" is entered into by the Defendant and the Government (whether written or oral) result in a material increase in the risk the surety intended to assume at the time of the execution of the Bond contract itself. Consequently, in Reese v. U.S., 76 U.S. 13,16 , this Court held: when a defendant is released on bail, there is an "implied covenant on the part of the government", that it will not "in any way interfere with the convent" between the defendant and sureties; or impair the sureties' obligation; or make any deals with the defendant which will increase the risks of the sureties; or affect" the surety's rights or remedies " as against

---

[13] Gansevoort Bank v. Empire State Surety Co. 195 NY 516 (1909).Becker v. Faver 280 NY 146, (1939); Tradesmen's Nat. Bank v. National Surety Co, (1902);Bank of New York v. Cheng Yu Corp, 413 N.Y.S.2d 471 (A.D. 2nd Dept, 1979) .

[14] See holdings of U.S. Weissenburger & U.S. v. Aguilar supra. Both cases are strikingly similar to the case at bar and the surety bonds were remitted.

the defendant.[15]

There is no question that the pre-exiting, separate, secret Plea Agreement entered into by the Defendant and the Government constituted a "material *modification*" by the Government, to the conditions set forth in the *specific language* of the "original" Appearance Bond Contract executed by the Appellants, because "it changed the character" of their obligation by significantly *increasing* the *risks* and liabilities they had "reasonably *intended* to assume" as sureties for the Defendant, at the time they executed said contract on September 2, 1992.

No where in the specific language of the original Bond that the Appellants executed, does it state that the Defendant had agreed to plea guilty, prior to their executing the Bond on Defendant's behalf. Clearly, the Appellants never agreed to assume the substantially greater risk of flight created by Defendant's agreement to plea guilty, which he did without their prior knowledge or consent. This was a factor they never "reasonably intended" to assume, nor were they able to take it into consideration (due to the lack of any "notice") at the time they took the "calculated risk" of

---

[15] See also, Wagoner v. Brady, 221 AD 405 (1927); AllState Ins. Co.v. American Bankers Insurance Co of Florida, 882 F.2d 856,862; U.S. v. Galvez-Uriarte, 702 F.2d 1323 (9th Cir. 1983); State of New Jersey v. Weissenburger, 189 N.J. Super. 172 (A.D. 1983); Continental Casualty Co. v. U.S., 337 F.2d 602, 603 (1st Cir. 1964); People v. Gonzalez, et al., 745 P.2d 263 (C.A.Colo. 1987), People v. Loomis, 60 Colo. 202 (1915).

becoming sureties for the Defendant, since it is undisputed that the Government deliberately concealed from them, Defendant's prior Agreement to plea guilty. It is equally *undisputed* that the Appellants *never* would have assumed the risk of becoming sureties for the Defendant had they known before hand of his guilt, as attested to in their individual sworn affidavits.

The Appellants' contentions and affirmative defense of illegal modification of contract are substantiated by the "simple" answer to a "common sense question":"Would a reasonable man volunteer(or for that matter any member of this Court)volunteer to undertake a bail bond for $260,000.00 for a man who has already agreed to plea guilty to the criminal charges against him" ?...The irrefutable answer to this question is an unequivocal..... NO !!! .

As essentially stated in U.S. v. Martinez, 613 F.2nd 473, at 477-479, (3rd Cir. 1980), the courts generally recognize that once a defendant has admitted his guilt and has come to grips with the realization that he is with all certainty going to prison for a substantial period of time, the "temptation to flee" is much "greater". This is especially the case when there is an unreasonably long stay of execution or sentencing. The longer the admittedly guilty defendant is out on bail the greater the temptation to flee is.[16] The Defendant in the instant case was no exception. Here, the

---

[16]See Reese v. U.S. 76 U.S. 13, 16.;State of New Jersey v. Vendrell, et. al., 197 N.J. Super 232, 484 A.2d 720 (S.Ct. 1984).

Defendant was given a *19 month stay of execution after pleading guilty*. Consequently, in cases (such as in the instant case) where the defendant has agreed to plea guilty prior to the execution of an Appearance Bond, the surety has an "*absolute right*" to know the extend of the risk he is assuming, prior to undertaking the grave responsibilities, risks and liabilities of executing an Appearance Bail Bond for such a defendant. As recognized by the 2nd Cir. Court of Appeals itself, in U.S. v. Edgan, 394 F.2d 262, 262, 267 (2nd Cir. 1968), "formal notice" by the Government regarding Defendant's guilt, would have given the Appellants the opportunity to relieve themselves completely of any liability under the Bail Bond in question, either by *never* assuming the role of sureties for the Defendant from the beginning or; by exercising their legal right to turn the Defendant over to the custody of the Court, any time thereafter. Neither of these options were available to the Appellants due to the deliberate lack of "formal notice" by the Government, contrary to its "duty" to give the Appellants said "notice".

The risk of flight by the Defendant (and consequently the risk to the Appellants as sureties) in the instant case, was further compounded by virtue of the fact that the Defendant had not only agreed to plea guilty but had also agreed to become a Government Informant and Witness, against co defendants and other drug dealers. Consequently, the Defendant ran the additional risk of being murdered or having his family murdered in retribution, if he were to be found out by those who he was spying against for the Government. U.S.

v. Aguilar, 813 F. Supp. 727, 728; U.S. v. Wissenburger, 459 A.2d693. [17] Fourteen *(14) months* after having formally plead guilty before the court, and being back out on the street while on bail and working for the Government as an informant, this is exactly what did happen. Defendant was found out as an informant, forcing him to run for his life before he could testify against his co defendants.

Aside from all of the aforementioned ergrecious violations of ethical and legal duty, the Government further compounded Appellants' risk as Sureties for the Defendant, by providing the Defendant with the necessary papers to renew his Viza sometime on or about May of 1993, and not taking the necessary precautions to avoid the Defendant's retrieval of his passport . Consequently, the Government's actions and negligence, facilitated the Defendant's (a Dominican National) ability to flee to the Dominican Republic, where there is no extradition back to the United States.[18] Again, this constitutes another legitimate ground for granting the Appellants' demand for an evidentiary hearing, People v. Avarez, 94 Misc.2d 334 (1968).

Argument # 3

Thirdly, the Appellants contend that this Court should

---

[17] Both of these cases, are strikingly similar to the instant case, and in those cases, the Court acknowledged the risks involved in such cases to all of the parties involved and remitted the bond.

[18] U.S. v. Galvez-Uriarte, 709 F.2d 1224 (CA. 9th Cir. 1983);People v. Avarez, 94 Misc.2d 334 (1968).

grant their petition for a writ of certiorari because the Court of Appeals (*like* the District Court) erred by failing to adhere to the mandates of U.S. v. Gambino, 17 F. 3rd 572 (2nd Cir. 1994) and thereby not addressing the *most critical threshold issue in this case* that being : *whether there ever existed a legally valid and enforceable Bond Contract between the parties, despite* acknowledging that a bail bond is essentially a surety contract governed by surety and contract law which *must satisfy all* the basic requisite elements of any legally binding contract , [19] . Apdx A-9.

B*efore* making a determination of whether the forfeiture in a case was merited under Fed.R.Crim.P. 46 (e)in accordance with the four factor test set forth in U.S. v. Gambino, 17 F. 3rd 572 (2nd Cir. 1994), the Court must *first* make a *threshold determination* of : (i). whether the bail bond in question satisfied all of the basic requisite elements of any legally binding contract and ; (ii). whether the sureties are legally entitled to be *relieved* of their bond obligations under the laws of contract and surety ship, in light of the *affirmative defenses* the sureties raise. Hence, the Surety Contract must be able to resist any defenses as to its validity and enforcement, including the affirmative defenses of: (A) illegal modification of contract; (B) fraudulent concealment and; (C) unconscious ability.

Only *after* making the above *threshold* inquiries and making a finding of a legally binding and enforceable Bond contract , can the Court then make a *secondary inquiry* into

---

[19]U.S. v. Martinez, 613 F.2d 473, 474 (3rd Cir. 1980).

whether the forfeiture was proper pursuant to Fed. R. Cr. P. 46 (e), 18 U.S.C.A. . If at that time it appears that "justice does not require the forfeiture", then the Court may remit the forfeiture judgment and thereby relieve the Sureties of their obligations under the bond. U.S. v. Gambino, 17 F. 3rd 572, 574 (2nd Cir. 1994)

Contrary to the requirements set forth in U.S. v. Gambino, 17 F. 3rd 572 (2nd Cir. 1994), here the Court of Appeals (as did the trial court) *automatically presumed* that a legally binding Bond Contract existed between the parties in this case, and did not even bother to address the issue. However, a proper analysis of this vital *threshold issue* would have led the Court to the irrefutable conclusion that the Bond Contract in question was "*void at its inception* " because at the time that the Appellants undertook the Bond Contract on the Defendant's behalf, they had *no intent of undertaking a $260.000.00 Bond for a man who had already agreed to plea guilty*, as attested to in their sworn affidavits.

At the time, they undertook the bond obligation in question, it is *uncontested* that the Appellants believed in *good faith* in the Defendant's innocence. The Government knew this to be the case but by its' own admission, and it *deliberately did not disclose* to the Appellants the fact that the Defendant had already formally executed an Agreement to plea guilty, prior to their executing the Bond Contract in question. Hence, there was *never a meeting of the minds between the parties, and no legally binding contract ever came into effect.*

Argument # 4:

Fourthly, the Appellants content that their Petition for a writ of certiorari Should Be Granted Because as a matter of *public policy* the Decision of the Court of Appeals mandates reversal by this Court because it *shocks the conscious* by providing for a *ready made legal road map for the Government to deliberately continue to deceive non professional sureties*, who act as innocent, third parties and volunteer to be sureties on behalf of a Defendant in whose innocence they believe based on family loyalty or friendship. The reality is that the Government uses *inherently unfair tactics* to get innocent third parties to become sureties for defendants who the Government wants to enlist as government informants and who secretly agree to plea guilty (without the knowledge or consent of the sureties) even *before* the sureties execute the bond in question. Through the use of fraudulent concealment, omission and silence, the Government not only entices said sureties to unknowingly assume a materially higher risk than the average surety but to unknowingly endanger their lives and the lives of their other family members or loved ones if the defendant is discovered to be working as an informant for the Government *in drug trafficking cases, where murder of the defendant and of his family members and close friends, as a form of retribution is not unusual.* This ergreciously unconsciousable behavior by the Government is done as a matter of *institutionalized policy on an everyday basis*, in cases such as the one at bar. As a practical matter, neither the Government (nor the Court

of Appeals for the 2nd Dept in this case and similar type case) gives any credence to the fact that as a matter of law, "uncompensated", "volunteer" sureties are "favored debtors", whose rights are vigorously protected under the law. [20]

Not only did the decision of the Court of Appeals *judicially ratify the institutionalized deceitful tactics of the Government but it also places an unreasonable , unfair and virtually unsurmountable burden of inquiry on sureties*, who may have no experience in criminal and legal matters; may have no experience as sureties; may not have the benefit of legal advise from their own attorneys ; and may not speak, read or write English, to know enough to ask the Prosecution whether the Defendant has *already agreed to plea guilty before they undertake a bond on his behalf.*[21] All this while sitting in an intimidating court room or at the U.S. Attorney's Office, in a room with a prosecutor, several FBI agents and the defendant's attorney. They must also be able to distinguish when they can rely on the prosecution to tell them the truth and when the prosecution is otherwise justified in deliberately and fraudulently concealing critically material

---

[20] U. S. v. Aguilar, 813 F. Supp.727, 728 ; First Citizens Bank & Trust Co. of Utica v. Sherman's Estate, 294 N.Y.S. 131 (AD , 4th Dept., 1937).

[21] First Citizen Bank & Trust Co. v. Sherman's Estate, 250 AD 339, 340 (1937); First National Bank & Trust Co. of Racine v.Notte, 97 Wis. 2d 207 (1980); General Crushed Stone Co. v. State of New York, et. al., 279 N.Y.S. 2nd 190 (C.A .of New York 1967).

information from them regarding the defendant's guilt, which could influence their decision on whether or not to become sureties for the defendant. This burden of inquiry and extraordinary perception may be so unreasonable and heavy, that it is unlikely that even an experienced attorney would be able to overcome it without being deliberately deceived by the Government..

The Decision in this case of the Court of Appeals mandates reversal not only because it is in complete conflict with prevailing state and federal case law and statutes but, because is it completely contrary to the mandates and higher duty of fair dealing, good faith, clean hands and honesty owed by the Government to every citizen it deals with in these type of cases and in fact in *all* situations . Moreover, the Government's underhanded tactics in these type of cases are a clear abuse of the governmental, legal and enforcement powers it is entrusted with to exercise in such criminal matters. In fact, the Government or prosecution is held to an even higher duty of *good faith*, *fair dealing* and *clean hands*. For instance,"The responsibility of a public prosecutor differs from that of the usual advocate; it is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers". NY ST CPR E.C. 7-13. See also, U.S. v. Frias-Ramirez, 670 F.2d 849 (C.A.9th Cir.1982) . It is unrealistic for the Court of Appeals to suggest that the Appellants here as sureties had equal bargaining power with the Government,

and that they made a "*meaningful*" and *informed* decision at the time they undertook the Bond obligations in question. This is simply not the case. In fact, it was factually impossible for them to of done so, because they had no knowledge of the Defendants's admitted guilt, thanks to the Government's deliberate non disclosure. It is equally unrealistic to expect that the Government would have been honest with the Appellants even if they had known enough to inquired about whether the Defendant had admitted his guilt at the time that they executed the Bond on his behalf.

The Decision of the Court of Appeals in this case, also violates and undermines the very *spirit and intent* of federal and state landmark cases such as U.S v Reese , U.S Robinson, U.S. v. Edgan , Rachman Bag Co v. Liberty Mut. Ins. Co., etc., and is in contervension of this Court's own mandates in cases such as Holy Trinity Church v. United States, 143 U.S. 457 (1892) where this Court held : "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers".[22] Acknowledgment of the law is not enough by our courts, it must be practiced not just preached taking into account the particular facts and circumstances of every individual case. "Thus, the District Court is given discretion to 'temper justice.....with mercy".

---

[22]See also, United Steelworkers of America, et. al v. Weber, et. al., 443 U.S. 193 (S.Ct. 1979) ; Securities & Exchange Commission, et. al., v. Mount Vernon Memorial Park, et. al., 664 F. 2d 1358 (CA. 9th Cir. 1980).

U.S. V. D'Argento, 339 F.2d 925,928 (C.A.7th, 1964). The word discretion " means sound discretion, not discretion exercised arbitrarily, but with due regard for that which is right and equitable under the circumstances, and means discretion directed by reason and conscious to a just result". Smaldone v. United States, 211 F. 2d 161 (C.A. 10th, 1954). Consequently, the Court is "empowered" under the aforementioned statute to "set aside the forfeiture of a bail bond if it appears that justice does not require enforcement of the forfeiture".....even though the default (was) willful, and even though existing circumstances do not make possible a trial of the case". Ibid."The purpose of a bond is not punitive, and its object is not to enrich government or punish the defendant". U.S. v. Parr, 594 F.2d 440 (C.A.5th, 1979); but merely to secure the defendant's presence. Dudley et al., v.U.S., 242 F.2d 656 (C.A. 5th Cir, 1957.

In this case, neither the law or equity required a forfeiture against the Appellants, and it was reversible error and abuse of discretion for the Court of Appeals not to relieve them of their bond obligations.

Wherefore, Appellants respectfully submit that their Petition for a Writ of Certiorari before this Court should be granted.

Respectfully Submitted

Carmen M. Grullon, Esq.
Grullon & Associates, P. C.
65 Bleeker Street, 4th Floor
New York, New York 10012
Attorney for Petitoners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1435 August Term, 1997
(Argued: April 7, 1998 Decided: July 28, 1998

Docket No. 97-1449

UNITED STATES OF AMERICA,

Appellee,

-v.-

ALEJANDRO MARTINEZ, also know as Alejandro Martinez-Garcia; JOSE DE JESUS ZAPATA-HERRERA, also known as El Chino, also known as Jose Mario Perez; NELSON AYBAR; JOHNNY AYBAR; FELIX HERNANDEZ; JOSE MIGUEL RODRIGUEZ; MICHAEL R. WILLIAMS; MARGARITA HERNANDEZ; FRANCISCO BOLIVAR; and HOLGUER MIGUEL GARAY, also known as Luis Alicia Reina,

Defendants,

MILAGROS ANGELES; RAFAEL POLANCO; ISABEL BERROCAL; and GUILLERMO ESTEVEZ,

Appellants.

Before: WINTER, Chief Judge, McLAUGHLIN and CALABRESI, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Griesa, Chief Judge), denying appellants' motion to vacate a default judgment ordering forfeiture of a bail bond.

AFFIRMED.

CHERYL A. KRAUSE, Assistant United States Attorney for the Southern District of New York, New York, NY (Mary Jo White, United States Attorney, Craig A. Stewart, Assistant United States Attorney, of counsel), for Appellee.

CARMEN M. GRULLON, New York, NY, for Appellants.

McLAUGHLIN, Circuit Judge:

BACKGROUND

In August 1992, Alejandro Martinez was arrested for conspiring to distribute cocaine. Almost immediately after his arrest, Martinez began cooperating with the government. On September 2, 1992, Martinez signed an agreement with the government in which he agreed to plead guilty to one count of conspiracy to distribute cocaine. He also agreed to assist in the prosecution of his co-conspirators and to testify against them. For its part, the government agreed to forego

charging Martinez with a number of other crimes and promised that if Martinez provided "substantial assistance" it would move for a downward sentencing departure pursuant to U.S.S. G. §5K1.1. Finally, the agreement provided that Martinez's family would be entitled to government protection at his request.

On September 2, 1992, the same day that he signed the agreement with the government, Martinez was released on $250,000 bail. On behalf of Martinez, five persons posted a $250,000 appearance bond secured by $10,000. The sureties on the bond were Milagros Angeles, Rafael Polanco, Isabel Berrocal, Guillermo Estevez and Francisca Nieves. Martinez's wife, Marisol, put up the $10,000 cash.

The bond provided that Martinez was required to "appear before [the district] court and at such other places as the defendant may be required to appear." The bond also specified that it was a "continuing bond (including any proceeding on appeal or review) which shall continue until such time as the undersigned are exonerated." The bond recited further that each surety would be "jointly and severally liable for the full amount of the bond in the event of any breach of bond conditions."

Before the sureties signed the bond, the government subjected them to a comprehensive interview. First, the government addressed the sureties as a group. Although Estevez and Berrocal were not proficient in English, the other three sureties were fluent in English and were able to explain the information presented by the government. In addition,

Martinez's lawyer, who is bilingual, was available to translate.

During the group interview, the government cautioned all the sureties that Martinez was facing serious charges and a long jail term. The government explained that it possessed strong evidence against Martinez and that he had a strong incentive to flee. Indeed, the government actually urged the sureties to assume that Martinez was guilty in assessing their willingness to sign the bond. The government explained that by signing the bond, each surety was personally guaranteeing that Martinez would make all the required appearances and would not violate his bail conditions. The government specifically warned the sureties that if Martinez violated any of his bail conditions, it would seek full recovery of the bond from the sureties, regardless of their ability to pay. Finally, the government urged the sureties to ignore anything that Martinez's family and lawyers told them about his innocence.

The government did not tell the sureties that Martinez had agreed to plead guilty; nor did it tell them that he was cooperating with the government.

The government then interviewed the sureties individually to assess their financial qualifications and their ability to exercise moral suasion over Martinez, should he decide to flee. In addition, the government again sought to ensure that each surety understood the information earlier imparted during the group interview. After interviewing each surety individually, the government found all five sureties qualified, and all five sureties signed the bond.

On September 16, 1992, pursuant to his agreement with the government, Martinez pled guilty in the United States District Court for the Southern District of New York (Griesa, C.J.), to one count of conspiracy to distribute cocaine. The government did not inform the sureties of this guilty plea. On October 26, 1993, Martinez pled guilty to a new charge of making false statements to a government agent. This second charge arose out of false statements made by Martinez during his debriefing session. The government also did not inform the sureties of this second plea.

Martinez was scheduled to testify against his co-conspirators on November 1, 1993. However, he did not show up at the trial. The government soon learned that Martinez fled to the Dominican Republic, purportedly because his co-conspirators had threatened members of his family living there. On December 2, 1993, Martinez was indicted for bail jumping. He has never returned to the United States.

On June 16, 1994, the government moved for a default judgment ordering forfeiture of Martinez's appearance bond. Notice was served on all the sureties and their counsel, but no objection was made to the forfeiture. On August 10, 1994, Judge Griesa granted the default judgment and ordered the bond forfeited.

About seventeen months later, the sureties moved to vacate the default judgment, arguing that: (1) they did not receive notice of a forfeiture hearing; (2) the government wrongfully concealed Martinez's agreement to plead guilty

and to cooperate with the government; and (3) they were entitled to an evidentiary hearing before forfeiture was ordered. Judge Griesa denied the sureties' motion on July 3, 1997, holding that the failure to disclose the plea agreement did not invalidate the bail bond. In addition, Judge Griesa found that the interests of justice did not require vacatur of the forfeiture order.

The sureties now appeal, solely on the grounds that: (1) their obligations under the bond were excused because the government concealed Martinez's guilty plea and his plea agreement; and (2) Judge Griesa should have granted an evidentiary hearing on their claim.

DISCUSSION

We review Judge Griesa's denial of the motion to vacate the default judgment under an abuse of discretion standard. See Commercial Bank of Kuwait v. Rafidain Bank, 15 F.3d 238, 243 (2d Cir. 1994).

The sureties argue that the government's failure to inform them of Martinez's plea agreement and subsequent guilty plea relieved them of all obligations under the bond. The sureties present three theories to support this claim: (1) the failure to inform the sureties was a material modification of the bail conditions; (2) the failure to inform constituted fraudulent concealment; and (3) the bail bond was unconscionable.

It is important to note that the sureties do not now

claim that the government had a duty to inform them that Martinez agreed to cooperate with the government; they make it clear that their claims are based only upon the government's failure to disclose Martinez's agreement to plead guilty and his subsequent guilty plea. Thus, the feature of Martinez's agreement that required him to cooperate is not at issue on this appeal.

Material Modification

The sureties believe that the government had a duty to inform them of any modification to Martinez's bail conditions, and , consequently, that the government's failure to do so relieved them of their obligations under the bond. They regard Marinez's agreement to plead guilty and the resulting guilty plea as modifications to the bail conditions that the government was obligated to disclose.

It is, of course, rudimentary that under certain circumstances the government's failure to notify a surety of a modification in bail conditions will discharge the surety's obligation under a bail bond. However, "[a] surety is not relieved of its obligation on a bond by a modification of bail conditions unless the government has materially increased the surety's risk without notice to and consent of the surety." United States v. Gambino, 17 F.3d 572, 574 (2d Cir. 1994). The sureties seek to invoke the "material increase" exception. Martinez's plea agreement, however, was signed before the bail bond was issued, and was never modified thereafter.

Thus, the agreement did not modify the terms of the bond. Properly analyzed, the sureties' argument concerning the plea agreement is actually a fraudulent concealment claim; we discuss this claim in detail below.

The guilty plea itself did take place after the bail bond was signed, and arguably could constitute a material modification of the bail conditions. However, the failure to disclose the guilty plea did not affect the sureties' obligations here because Martinez's guilty plea did not materially increase the sureties' risk.

The sureties signed a continuing bond that guaranteed the defendant's appearance even after his conviction. See United States v. Catino, 562 F.2d 1, 3 (2d Cir. 1977). A defendant's guilty plea does not constitute a material modification of the terms of a continuing bond because by signing such a bond, a surety assumes whatever increased risk of flight results from the defendant's conviction, whether at trial or after a guilty plea. See United States v. Noriega-Sarabia, 116 F.3d 417, 421 (9th Cir. 1997); United States v. Casey, 671 F.2d 975, 977 (6th Cir. 1982); see also Catino, 562 F.2d at 3-4. Since Martinez's guilty plea did not materially increase the risk to the sureties, the government's failure to disclose it did not relieve the sureties of their obligations under the bond. See Gambino, 17 F.3d at 574.

Fraudulent Concealment

The sureties also posit that their obligations under the

bond are excused because the government fraudulently induced them to become sureties by concealing Martinez's agreement to plead guilty.

A bail bond is interpreted "within the general framework of suretyship and contract law." United States v. Martinez, 613 F.2d 473, 476 (3d Cir. 1980). We apply federal common law in assessing a surety's obligations under a federal bail bond. See Catino, 562 F.2d at 2.

"[S]ureties must usually take the initiative and inquire about information them deem important." Rachman Bag Co. v. Liberty Mut. Ins. Co., 46 F.3d 230, 235 (2d Cir. 1995). However under certain circumstances, an obligee's failure to disclose information constitutes fraudulent concealment and is a ground for voiding a suretyship contract. See id.

Traditionally, the failure to disclose information to a surety constitutes fraudulent concealment when: (1) the information materially increases the surety's risk compared to the risk that the obligee has reason to believe the surety intends to assume; (2) the obligee knows that the surety does not know the information; and (3) the obligee has an opportunity to communicate the information tot he surety. See Restatement (Third) of Suretyship and Guaranty §12(3) (1995) ("Restatement (Third)"); see also Rachman, 46 F.3d at 235.[1]

---

[1]The parties briefed and argued the point of New York law as to whether an obligee's failure to disclose crucial information, in the absence of an independent duty to disclose the information, amounts to fraudulent concealment. See Rachman, 46 F.3d at 235-

The Restatement (Third) provides that the traditional elements of fraudulent concealment are not, in themselves, grounds for voiding a suretyship contract. Section 12 (3) of the Restatement (Third) explains that if a surety demonstrates the three traditional elements of fraudulent concealment, the obligee's actions constitute only a material misrepresentation, which is not an independent ground for voiding the contract. Under Section 12(1) of the Restatement (Third), a surety's obligations are voidable only if it was justified in relying on the material misrepresentation. Thus, under the Restatement (Third), a surety's obligations are voidable for fraudulent concealment only if the surety was reasonably justified in relying on the non-existence of the information that the obligee failed to disclose. See Restatement (Third) §§12(3), (1).

The second and third elements of the Restatement (Third)'s fraudulent concealment test are obviously present in this case: the government know the sureties were ignorant of Martinez's plea agreement, and the government had an opportunity to inform them of the agreement when it gave them the other information about the bond.

The sureties argue that the first element of fraudulent concealment, the materiality of the undisclosed information, is also satisfied. Each surety filed an affidavit stating that he or she would not have signed the bond had they known that

---

36. As tempting as it might be to address this quodlibet, we see no need to do so since, as we explain below, the sureties fail to satisfy the federal common law standard for fraudulent concealment.

Martinez had already agreed to plead guilty. And Judge Griesa appeared to accept the sureties' claims when he stated that "[t]he sureties signed the bond because they believed that Martinez was not guilty and that he should be released on bail."

The materiality inquiry, however, should not focus simply on what the surety considered material when he signed the contract. Rather, the inquiry is whether the undisclosed fact materially increased the risk that the obligee had reason to believe the surety would be unwilling to undertake. In short, the standard focuses on the obligee's reasonable perception of the risk the surety is willing to undertake. See Restatement (Third) §12(3) cmt.

In this case, the fact that Martinez had agreed to plead guilty did not materially increase the risk to the sureties beyond the risk that the government had reason to believe the sureties were willing to undertake. The government told the sureties to assume that Martinez was guilty when they were deciding whether to assume the obligations under the bail bond. Nobody objected to proceeding on such an assumption, and none of the sureties expressed a belief that Martinez was indeed innocent. The sureties' willingness top sign the bond after being told to assume that Martinez was guilty gave the government reason to believe that the sureties were willing to assume the risk that Martinez was indeed guilty.

The sureties' fraudulent concealment claim also fails because their reliance on the government's alleged misrepresentation was not justified. See Restatement (Third)

§ 12(1). The sureties state that they signed the bail bond only because they assumed that Martinez was innocent. Their assumption, however, was manifestly unreasonable in light of the government's express instruction to assume that Martinez was guilty.

Unconscionability

The sureties also claim that the bail bond was unconscionable, and that we should therefore refuse to enforce the forfeiture provisions of the bond. We are not persuaded.

For one thing, the sureties did not raise unconscionability below, and thus, have waived this argument. See Silverman v. Mutual Benefit Life Ins. Co., 138 F.3d 98, 103 (2d Cir. 1998). In any event, the sureties have failed to show that the bail bond was unconscionable.

The doctrine of unconscionability seeks to prevent sophisticated parties with "grossly unequal bargaining power" from taking advantage of less sophisticated parties. United States v. Bedford Assocs., 657 F.2d 1300, 1314 (2d Cir. 1981). "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965); see Bedford Assocs., 657 F.2d at 1312-13.

The sureties' argument lacks merit because the terms

of the bail bond were not unreasonably favorable to the government. Although the bond called for forfeiture if Martinez failed to appear, the forfeiture term was reasonable in light the bond's purpose. Without a provision requiring forfeiture, a bail bond would provide little disincentive for a defendant to flee and little incentive for the sureties to prevent the defendant from taking flight.

Evidentiary Hearing

The sureties argue that Judge Griesa should have held an evidentiary hearing on all their claims before denying their motin to remit the forfeited bail. The sureties are incorrect.

We have not yet ruled on the standard of review applicable when a district court refuses to hold an evidentiary hearing on a surety's motion to remit bail. However, every Circuit that has considered the question has determined that such a decision is reviewed under an abuse of discretion standard. See, e.g., United States v. Santiago, 826 F.2d 499, 505 (7th Cir. 1987). We agree.

The sureties requested an evidentiary hearing so they could prove their ignorance of Martinez's agreement with the government. However, no hearing was required because Judge Griesa accepted the sureties claimed ignorance of lthe agreement. Judge Griesa also credited their assertion that they would not have signed the plea agreement had they known that Martinez was guilty. A hearing would have served no purpose. Judge Griesa therefore did not abuse his

discretion by decling to hold such a hearing.

CONCLUSION

Judge Griesa properly denied the sureties motion to vacate the default judgment of forfeiture. Accordingly, the judgment of the district court is hereby AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN
DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
	:	92 Cris. 718
-against-	:	
	:	Opinion
ALEJANDRO MARTINEZ, et al.,	:	
Defendants	:	

Defendant Alejandro Martinez was arrested on August 14, 1992 and charged with two drug-related conspiracies. On September 2, 1992 Martinez was released on bail after signing a $250,000 appearance bond, secured by $10,000 cash and co-signed by five financially responsible individuals: Milagros Angeles, Rafael Polanco, Isabel Berrocal, Guillermo Esteves, and Francisca Nieves.

On September 16, 1992 Martinez entered a plea of guilty pursuant to a cooperation agreement with the government. As part of his agreement with the government, Martinez consented to testify in other criminal actions brought by the government.

On November 1, 1993, Martinez failed to appear to give testimony in another case before this court. A warrant was issued for his arrest but Martinez was never located. It is

believed that Martinez fled to the Dominican Republic.

On December 2, 1993, Martinez was indicted for violating a condition of his bail. The Government also filed a motion for default judgment to foreclose on his appearance bond. The court granted the motion on August 10, 1994.

The sureties who co-signed the appearance bond have moved under Fed. R. Crim. P. 46(e)(2) to set aside the forfeiture. They argue that the Government did not provide adequate notice of a hearing on the motion and that the Government misled the sureties at the time the sureties signed the bond.

The sureties admit that they were served with the notice of motion for default judgment returnable on July 15, 1994. No opposition to this motion was filed with the court. No surety requested an opportunity to be heard. When the return date passed without objection, the court entered an order of default judgment.

The sureties claim that the Government encouraged them to sign the appearance bond and that the Government failed to disclose that Martinez was cooperating with he government. The sureties have submitted affidavits, some of which allege that Government agents assured them that they had "nothing to worry about" and that there would be "no problem." In response, the Government has submitted an affidavit from the prosecutor who handled the case, stating that the sureties were informed of the risk involved and that no assurances were offered to the sureties in the prosecutor's presence.

The court finds that the sureties are all adults who understood that they were entering an agreement to guarantee a $250,000 appearance bond. Although the sureties may not possess sophisticated knowledge of bonds, the court believes that they understood the obligation that the bond created.

The sureties' allegations that the Government did not tell them that Martinez was cooperating with the Government is irrelevant. The Government had no obligation to reveal this fact to the sureties. Indeed, the Government could not have revealed such sensitive information to the sureties without endangering Martinez.

Fed. R. Crim. P. 46(e)(2) allows the court to set aside a forfeiture in whole or in part if it appears that justice does not require the forfeiture. In considering the sureties' motion, the court must consider the following factors: (1) whether defendant's breach of the bond was willful, (2) whether the Government suffered prejudice as a result, (3) whether mitigating circumstances caused defendant to flee, (4) whether the sureties assisted in the apprehension of defendant, and (5) whether the sureties are professionals for friends or family members of defendant. See United States v. Gambino, 17 F.3d 572, 574 (2d Cir. 1994).

The equitable factors outlined in Gambino do not favor the sureties. Martinez apparently fled the country willfully. As a result, the Government was prejudiced because his testimony could not be used in other trials. Since Martinez has not been apprehended, the court has no information concerning mitigating circumstances that may

have motivated his flight. Furthermore, there is no indication that the sureties have assisted in his apprehension. Although the sureties are not professionals, they are friends and relatives of Martinez and, as such, are in a position to exercise moral suasion over him.

The sureties signed the bond because they believed that Martinez was not guilty and that he should be released on bail. Martinez has obviously betrayed their trust. The court recognizes that the actions of Martinez have gravely prejudiced the sureties. Unfortunately the risk of this is inherent in an appearance bond.

For the foregoing reasons, the motion to set aside the default judgment is denied.

SO ORDERED.

Dated: New York, New York
July 3, 1997

/s/ Thomas P. Griesa
Thomas P. Griesa
U.S.D. J.